Supreme Court, U.S.
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No. 95-672

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CORAMAE ELLA GARY,
Petitioner,
v.
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
and JAMES EDWARD LONG,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly determined that respondent could not be held strictly liable for a violation of Title VII under a *quid pro quo* claim of sexual harassment?

2. Whether the Court of Appeals correctly interpreted common law agency principles to foreclose liability for a hostile work environment claim where the employee knew or should have known that the alleged harassment violated the employer's well-established policy and that fair and effective grievance procedures were available?

LISTING OF AFFILIATES PURSUANT TO RULE 29.1

Pursuant to Rule 29.1, Respondent Washington Metropolitan Area Transit Authority ("WMATA") states that it is an agency and instrumentality of Maryland, Virginia, and the District of Columbia created by an interstate compact, as authorized by Congress. *See* Pub. L. No. 89-774. WMATA operates a regional transportation system in the Washington, D.C. metropolitan area. As a governmental entity, WMATA does not have any parent corporation, affiliates, or subsidiaries.

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STATUTE INVOLVED

The relevant language of 42 U.S.C. § 2000e-2 is set forth in the petition at 2. This case also concerns 42 U.S.C. § 2000e, which provides, in relevant part:

> For the purposes of this subchapter—
>
> * * * *
>
> (b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person . . . .

STATEMENT OF THE CASE

Petitioner Coramae Ella Gary was employed by respondent Washington Metropolitan Area Transit Authority ("WMATA"). This case arises out of petitioner's allegations that she was sexually harassed by one of her supervisors, James Edward Long. Even though petitioner concedes that the alleged conduct violates well-publicized WMATA policies that prohibit harassment and provide fair and effective grievance procedures (Pet. App. 13a), she nevertheless contends that WMATA is subject to strict liability for such acts under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). Pet. 9-10. The district court granted summary judgment in favor of WMATA (Pet. App. 42a-45a) and the Court of Appeals for the District of Columbia Circuit affirmed. *Id.* at 5a-14a. The D.C. Circuit held that WMATA was not liable because the undisputed evidence established that petitioner "knew or should have known that the employer did not tolerate such conduct and that she could report it to [her] employer without fear of adverse consequences." *Id.* at 12a. The record evidence supporting that determination is summarized below.

A. The Nature of the Harassment Alleged.

At all relevant times, both Petitioner and Long were employees of WMATA. Petitioner was a stock clerk. Pet. App. 36a. Long was her second-level supervisor (*i.e.*, the supervisor of her immediate supervisor), but not the senior supervisor at the warehouse where she worked. *Id.*

Petitioner alleged that Mr. Long repeatedly subjected her to offensive sexual remarks and "told her how easy it would be for her at work if she would have a sexual relationship with him." Pet. App. 37a. Petitioner, however, alleges that she uniformly "rejected Mr. Long's sexual advances." Pet. 10 n.4. Petitioner contends that Mr. Long threatened adverse employment consequences if she continued to refuse his advances (Pet. 3), but there is no

dispute that "those threats were not carried out." Pet. App. 9a. Thus petitioner does not argue that Mr. Long altered the economic terms of her employment based upon her refusal to comply with his threats.

She does allege that Mr. Long forcibly raped her during the work day on one occasion. This allegation was not raised by petitioner or her counsel at any point during WMATA's investigation or in the charge of discrimination that she filed at the Equal Employment Opportunity Commission. Joint Appendix ("J.A.") 29, 255.[1] Petitioner further contends that Mr. Long threatened to fire her and her husband (a bus driver for WMATA) if she reported Long's conduct. Pet. App. 37a. It was uncontroverted, however, that Mr. Long did not have the authority to fire or suspend petitioner. J.A. 233 at ¶ 4.

Petitioner did not advise anyone at WMATA (or elsewhere) about her allegations against Mr. Long for almost two years after the harassment allegedly began. Pet. App. 3a, 38a. Petitioner contends that she did not report these allegations to WMATA before that time because she was "too afraid that Mr. Long would carry out his threats." Pet. 4. The undisputed evidence submitted on summary judgment nevertheless established that petitioner's alleged concern was unfounded.

B. WMATA's Efforts to Prohibit, Prevent, and Remedy Sexual Harassment.

In the course of the district court proceedings, WMATA introduced substantial, uncontroverted evidence that it aggressively promoted a well-publicized program prohibiting any type of sexual harassment. Pet. App. 13a-14a. Notices were issued to all employees emphasizing that sexual harassment "will not be tolerated at any level within the Authority." J.A. 206-07; 217-18. In addition, the WMATA Office of Civil Rights sponsored periodic

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[1] Citations to the "Joint Appendix" refer to the Joint Appendix submitted to the Court of Appeals.

seminars on sexual harassment and other EEO issues, including one program that included approximately 600 supervisors. J.A. 215 at ¶¶ 5-6; 209 at ¶ 4; 211-13.

WMATA had also established a comprehensive EEO program that provides counseling services to employees and procedures for processing discrimination complaints. J.A. 215-16. That program is widely publicized. As the court of appeals observed, WMATA "prominently displayed the names, photographs, and telephone numbers of its Equal Employment Opportunity Counselors" in employee areas. Pet. App. 4a. Further, WMATA's "detailed and thorough" discrimination complaint procedures do not require persons alleging discrimination to report their concerns to an offending supervisor. *Id.* at 14a. Instead, "[t]hese procedures provided employees with the right to complain informally to EEO Counselors and formally to WMATA's Office of Civil Rights, the right to representation, and the right to an internal review of any unfavorable determinations." *Id.* at 4a.

Petitioner's membership in a union afforded her additional rights as well. Petitioner could not be terminated without cause (J.A. 235 at ¶ 6; 239), and grievances arising under the contract, including grievances based upon sex discrimination, could be submitted to binding arbitration. J.A. 234-35; 239-40.

Throughout the proceedings below, petitioner in fact never claimed that she was unaware of WMATA's policies prohibiting sexual harassment or its procedures for reporting violations of that policy. Nor did she offer any evidence to suggest that WMATA's policy was ineffective. As the district court found, petitioner "has not made any allegations that sexual harassment of other employees was tolerated by WMATA or that WMATA did anything to suggest that it would not take her claims seriously or protect her against reprisals." Pet. App. 44a. Petitioner in fact conceded at oral argument in the Court of Appeals that she has " 'no challenge to the adequacy of WMATA's

procedures in terms of providing avenues for relief for sexual harassment.'" *Id.* at 13a. Petitioner's awareness of her rights as an employee is underscored by the fact that she pursued a grievance concerning work hours during the very period that she claims she was being harassed by Mr. Long. J.A. 258.

C. Notice to WMATA and WMATA's Response.

By letter dated February 28, 1990, petitioner's attorney requested that WMATA conduct an investigation into petitioner's allegations of sexual harassment. J.A. 252. This letter (which contained no allegation of rape or physical assault) was WMATA's first notice of petitioner's claims.[2] J.A. 205 at ¶ 6.

WMATA immediately assigned an attorney with extensive experience in employment matters to conduct a detailed investigation of petitioner's allegations. Pet. App. 14a; J.A. 205 at ¶ 7. The WMATA attorney met with petitioner and her counsel and "interviewed all persons concerned." Pet. App. 14a. Upon completion of a thorough investigation, the attorney prepared a written report concluding that there was no credible evidence that Long had sexually harassed petitioner. J.A. 255-59. The investigator nevertheless recommended to the General Counsel that petitioner be permitted to transfer to another facility. J.A. 250-51 at ¶¶ 14-15. WMATA adopted that recommendation. Pet. App. 14a. In fact, petitioner did not work at the same facility as Mr. Long at any time after her attorney first notified WMATA of her allegations. *Id.* at 39a.

D. Proceedings Below.

1. Petitioner filed an action against WMATA and Long in December 1990, seeking damages under Title VII

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[2] Petitioner had made an anonymous telephone call on February 14, 1990 to the special assistant to WMATA's General Manager. However, petitioner refused to identify herself, notwithstanding the special assistant's offer to help. J.A. 163-65.

and various common law tort claims. Pet. App. 35a-36a. As the Court of Appeals observed, petitioner's claim was "premised on the 'hostile environment' theory of sexual harassment: She alleged that Long's 'actions . . . created a sexually hostile atmosphere detrimental to [petitioner's] emotional and physical health.' " *Id.* at 4a (quoting Complaint ¶ 13). She did not allege a claim of *quid pro quo* discrimination. As set forth, however, petitioner did not refute the known availability and efficacy of WMATA's procedures for processing sexual harassment complaints in the district court or in the Court of Appeals. Pet. App. 39a-40a. Instead, petitioner appeared to oppose summary judgment based on her subjective fear that Mr. Long would have her fired if she reported his conduct. *Id.* at 43a-44a.

2. The district court held that subjective evidence of petitioner's fear of reprisals by Long did not provide a sufficient basis to impose liability on WMATA. Pet. App. 43a. Instead, the district court held that an employer cannot be held strictly liable for a claim based upon allegations that a supervisor has created a hostile work environment if a reasonable person would have known that the supervisor's conduct was not authorized and would be fully and fairly investigated if reported. *Id.* at 43a-44a. The district court concluded that, "[w]here, as here, there is nothing in the record to suggest that the employer, through its policy on sexual harassment or otherwise, has done anything which would contribute to an employee's reluctance to notify the employer of his or her claims" an employer should not be liable simply because the employee has a subjective fear of reporting the claim. *Id.* The district court granted summary judgment because "the record is full of uncontested indications that WMATA has a strong policy against sexual harassment, including a grievance procedure through which employees can raise complaints, and that it takes such complaints seriously." *Id.* at 44a.

3. The Court of Appeals affirmed. First, the Court held that WMATA was not liable for Mr. Long's alleged acts under a *quid pro quo* claim of harassment. Although the Court recognized that petitioner had not raised that theory in the district court (Pet. App. 4a), the Court did not resolve the question whether the claim had thereby been waived, because it concluded that the claim was not viable in any event. *Id.* at 8a. The Court held that threats of adverse employment action tied to sexual favors can clearly create a hostile work environment in violation of Title VII. *Id.* at 9a. Such threats, however, only alter the tangible or economic terms of employment—the predicate for a *quid pro quo* claim of liability—where those threats can be and are actually carried out. *Id.* at 8a-9a. Because petitioner never argued that Mr. Long had actually altered the economic terms of her employment based upon her response to his demands, the Court held that the *quid pro quo* theory did not apply. *Id.*

The Court of Appeals also held that petitioner had not proffered any basis for holding WMATA liable for a hostile work environment claim. Petitioner did not argue that WMATA could be held liable for Mr. Long's alleged acts under a negligence theory because there was no evidence that WMATA knew or should have known about those acts. The Court of Appeals nevertheless recognized that employers could be held liable for the acts of supervisors under common law principles of agency. Pet. App. 10a. The Court carefully examined Restatement (Second) of Agency § 219(2)(d) (1958)—relied upon by petitioner. Pet. App. 11a. That section provides that a principal may be held liable if his "servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." The Court, however, found that this rule must be interpreted in light of Restatement (Second) of Agency § 166, cmt. a (1958). Under that provision, a principal cannot be liable for the acts of an agent where "a person

has information which would lead a reasonable man to believe that the agent is violating the orders of the principal." Pet. App. 12a.

Applying these common law rules, the Court concluded that there was no issue of material fact concerning WMATA's liability. The court held that "when, as here, an employer has taken energetic measures to discourage sexual harassment in the workplace and has established, advertised, and enforced effective procedures to deal with it when it does occur, it must be absolved of Title VII liability . . . [if] its employees could not reasonably have failed to know of those measures." Pet. App. 13a. Because petitioner conceded that WMATA's procedures were adequate and made "no claim that these procedures were not known by the employees," the court affirmed the dismissal of petitioner's Title VII claim. *Id.*

The Court nevertheless reversed the district court's dismissal of the common law tort claims against WMATA for lack of jurisdiction. The Court of Appeals determined that common law claims against WMATA fall within the original jurisdiction of federal courts and therefore had to be addressed on the merits. Pet. App. 16a.[3]

ARGUMENT

A. There Is No Conflict in the Circuits That Requires Resolution by This Court.

Petitioner contends that there is a "serious and growing conflict among the federal circuit courts of appeals" on "two important questions" concerning employer liability for sexual harassment. Pet. 6. With respect to the standards governing the imposition of *quid pro quo* liability, petitioner contends that the decision of the D.C. Circuit "conflicts directly" with *Nichols v. Frank*, 42 F.3d 503 (9th Cir. 1994), and *Karibian v. Columbia University*,

[3] The Court of Appeals also instructed the district court to determine whether it should assert supplemental jurisdiction over the common law claims filed against Mr. Long. Pet. App. 16a-17a.

14 F.3d 773 (2d Cir.), *cert. denied*, 114 S. Ct. 2693 (1994). Pet. 9-10. With respect to the standards for imposing employer liability under a hostile work environment claim, petitioner contends that the decision below "squarely conflicts" with *Karibian* and *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343 (4th Cir. 1995). Pet. 12. Neither alleged "conflict" warrants review by this Court.

1. The Court of Appeals held in this case that threatened discrimination by a supervisor is redressable, if at all, as a hostile work environment claim—and not as a *quid pro quo* claim—if the employee does not accede to her supervisor's demands and the threats are never carried out. Numerous decisions support the D.C. Circuit's conclusion that a change in the concrete or economic terms of the employment is a prerequisite for *quid pro quo* liability. *See, e.g., Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir. 1993); *Highlander v. K.F.C. National Management Co.*, 805 F.2d 644, 648 (6th Cir. 1986). *See also*, Pet. App. 8a-9a (citing cases). Moreover, the decisions relied upon by petitioner do not hold otherwise.

In *Nichols*, the plaintiff presented evidence that her supervisor extended "employment benefits" to her on the basis of "sexual favors." 42 F.3d at 509. Specific evidence supported the inference that the plaintiff's supervisor granted requests for leave and provided favorable work evaluations in exchange for her submission to discriminatory demands for sexual favors. *Id.* at 513. Under these circumstances—which are totally absent from the record in this case—the Ninth Circuit concluded that the employer could be strictly liable for the acts of a supervisor who had exercised his authority to take personnel actions based upon discriminatory motives. Some statements in the opinion written by Judge Reinhardt suggest that *quid pro quo* liability could be imposed when a supervisor merely "intertwin[es] a request for the performance of sexual favors with a discussion of actual or potential job benefits." 42 F.3d at 513. That part of

the opinion was not joined by the other two members of the panel, however. *See* 42 F.3d at 516 (concurring opinions of Fernandez, J., and Brunetti, J.).

Similarly, the Second Circuit's decision in *Karibian* does not conflict with the D.C. Circuit's analysis on this issue. In *Karibian*, there was specific evidence that "the conditions of [the plaintiff's] employment—including her raises, hours, autonomy and flexibility—varied from time to time, depending on her responsiveness to" the offending supervisor. 14 F.3d at 776. The Second Circuit found that this evidence was sufficient to establish liability because:

> "[t]he relevant inquiry in a *quid pro quo* case is whether the supervisor has *linked tangible job benefits* to the acceptance or rejection of sexual advances. It is enough to show that the supervisor *used the employee's acceptance or rejection of his advances as the basis for a decision* affecting the compensation, terms, conditions or privileges of the employee's job."

14 F.3d at 778. (Emphasis added.) Petitioner does not argue that Mr. Long based any decision concerning "tangible job benefits" on her "acceptance or rejection" of his alleged demands for sexual favors. *Id.* Applying the standard adopted in *Karibian*, petitioner's claims would fail. There is accordingly no conflict for this Court to resolve.

2. Petitioner has also failed to establish any circuit conflict concerning the legal standard governing an employer's liability for a hostile work environment that warrants this Court's review. In *Karibian*, the Second Circuit did find that the employer was liable for a hostile work environment created by a supervisor under § 219 of the Restatement without regard to the availability of reasonable complaint procedures. 14 F.3d at 780. But the Second Circuit also noted that its conclusion on this issue "follow[ed] naturally from our earlier conclusion that Karibian stated a valid claim for *quid pro quo*

harassment." 14 F.3d at 780. The Second Circuit further recognized that "[a] rule of employer liability deriving from traditional agency principles cannot be reduced to a universal pat formula." *Id.* at 779. It is accordingly quite possible that the Second Circuit would agree that the availability of adequate complaint procedures—as here—would prevent mere threats from giving rise to liability.[4]

There is added reason for this Court to await further developments on these issues in the courts of appeals. Although *Karibian* considered and applied the section of the Restatement discussing concepts of apparent authority, the court did not consider or address the implications of § 166 concerning the knowledge of the complaining employee. As the District of Columbia Circuit found in the instant case, § 166 limits the reach of § 219 by foreclosing liability "[i]f a person has information which would lead a reasonable man to believe that the agent is violating the orders of the principal." Restatement § 166, cmt. a. The Third Circuit applied this same principle in *Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 110 (3d Cir. 1994) (A policy known to potential victims . . . eradicates apparent authority the harasser might otherwise possess.") There is accordingly a significant possibility that the reasoning of the panel in *Karibian* will be clarified when the Second Circuit considers the reasoning and authorities relied upon by the D.C. Circuit and the Third Circuit on this issue.

Petitioner's claim of a direct conflict with the Fourth Circuit's decision in *Martin* also fails. In *Martin*, the Fourth Circuit *did not* hold that an employer's policy prohibiting discrimination and establishing grievance procedures are immaterial to a determination of liability.

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[4] Petitioner failed to address the Second Circuit's recent decision in *Tomka v. Seiler Corp.*, 66 F.3d 1295 (2d Cir. 1995) in her petition. That decision also follows *Karibian*, but is factually distinguishable from this case and does not cite the decision below or consider its reasoning.

Pet. 12. Instead, the *Martin* court evaluated a variety of factors in determining that the employer should be liable for the conduct at issue. Contrary to the facts in this case, in *Martin*, the court was presented with a situation where the harassing supervisor was the Vice President, General Manager, and member of the Board of Directors; he wielded "full authority to hire, fire, promote, and discipline"; and he was the *only person* authorized to receive employee complaints of discrimination under the company's procedures. 48 F.3d at 1352. In addition, there was evidence demonstrating that the plaintiff submitted to the Vice President's sexual demands because he threatened to fire her. *Id.* at 1353. It is hardly surprising—based on these facts—that the court gave credence to the plaintiff's testimony that "she knew that if she had reported [the Vice President's] conduct to any one, she would have been fired." *Id.*

Other decisions of the Fourth Circuit strongly suggest that employers would not be subjected to liability for the acts of supervisors who threaten to use their position in a discriminatory manner without regard to the nature of the supervisor's authority and the policies and procedures adopted by the employer. *See, e.g., Spicer v. Commonwealth of Virginia*, 66 F.3d 705, 711 (4th Cir. 1995) (*en banc*) (reversing Title VII judgment in favor of the plaintiff because the employer had taken effective remedial action to correct hostile conduct, emphasizing that "[e]mployers cannot be saddled with the insurmountable task of conforming all employee conduct at all times to the dictates of Title VII, irrespective of their knowledge of such conduct or the remedial measures taken in response to such conduct.")

B. The Issues Presented by Petitioner Should Not Be Reviewed in This Case.

Even if petitioner were correct that there is a conflict among the circuits, this case does not present an appropriate opportunity to address the issues raised. One of

the issues was not properly preserved below and the case does not otherwise present an appropriate opportunity to resolve these questions.

1. Petitioner has waived any argument that WMATA should be subject to liability under a *quid pro quo* claim. In her Complaint, Amended Complaint, Opposition to WMATA's Motion for Summary Judgment, and in the two hearings related to the motion before the district court, petitioner expressly limited her sexual harassment claim to that of hostile environment discrimination. She did not raise a *quid pro quo* claim. Pet. App. 4a. When petitioner raised her *quid pro quo* theory for the first time on appeal, WMATA objected, and the Court of Appeals reserved decision on the question whether the argument had been waived. *Id.* at 8a.

This Court should accordingly deny certiorari in light of petitioner's waiver. *See Hormel v. Helvering*, 312 U.S. 52, 556 (1941) ("Ordinarily an appellate court does not give consideration to issues not raised below"); *Saxton v. AT&T*, 10 F.3d 526, 533 (7th Cir. 1993) (holding that a plaintiff who had relied solely upon a hostile work environment claim in the district court had waived any right to proceed with a *quid pro quo* claim before the Court of Appeals); *Miller v. Avirom*, 384 F.2d 319, 321 (D.C. Cir. 1967) ("because the issue was neither raised nor decided in the District Court, we do not address it on this appeal.")

Further, even if this Court were to grant certiorari and resolve the issue, it would still be open to respondents on remand to seek affirmance of the entry of summary judgment on the grounds that the *quid pro quo* claim had been waived. Even a ruling in petitioner's favor by this Court could accordingly prove to be of little significance. *See SS Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation").

2. Petitioner contends that this case presents the Court with an opportunity to provide greater guidance than it afforded in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). In *Meritor*, however, this Court declined to provide any more definitive guidance because the record lacked detailed factual findings about precisely what had occurred in the workplace. This case is in the same procedural posture as *Meritor*.

The employer in *Meritor* maintained that it should not be liable because the plaintiff failed to invoke an established grievance procedure to stop the alleged harassment. This Court found that the "debate over the appropriate standard for employer liability has a rather abstract quality about it" because the lower courts had not made any factual findings concerning whether the supervisor had "made any sexual advances toward respondent at all, let alone whether those advances were unwelcome." 477 U.S. at 72. This Court accordingly declined to offer additional guidance on this issue (which was nevertheless quite substantial). As in *Meritor*, the lower courts in this case similarly did not make any factual findings about the underlying merits of the alleged harassment. This Court would accordingly be faced with the prospect of once again trying to elaborate on standards for liability without the benefit of a full factual record. *Id.*

C. The Court of Appeals Correctly Applied This Court's Decision in *Meritor*.

Petitioner claims that certiorari should be granted because the D.C. Circuit's decision "strayed from this Court's holding" in *Meritor* and is "flatly contrary" to the Court's directive to apply "agency principles." Pet. 7. In fact, it is the rule of law petitioner advocates that is "flatly contrary" to *Meritor*.

1. Petitioner claims that WMATA is subject to strict liability because a supervisor threatened adverse employment action. Pet. 9-10. *Meritor* leaves little room for

such a claim. The employee in *Meritor* alleged that she was raped by a corporate Vice President and did not utilize the Company's complaint procedure because she feared retaliation. The lower court, the D.C. Circuit, had characterized these facts as a hostile environment claim—not a *quid pro quo* claim—because the discriminatory conduct did not directly alter the economic benefits afforded to the employee. 477 U.S. at 62. This Court did not in any way suggest that the Court of Appeals might have erred by categorizing the plaintiff's claim as one involving a hostile work environment. Moreover, this Court expressly held that a theory of strict liability was inappropriate on these facts. *Id.* at 72. As in *Meritor*, petitioner's claim does not involve the grant or denial of "concrete employment benefits." *Id.* at 62.

The Court of Appeals in this case accordingly did not err in its decision to analyze the case under the rubric of a "hostile or offensive working environment." 477 U.S. at 62. As the Court of Appeals found, threats that are not carried out alter the "working environment," but they do not alter the "economic benefits" of the job. *Id.*[5]

2. The Court of Appeals also properly declined petitioner's invitation to impose strict liability on WMATA based upon the allegation that Mr. Long utilized apparent authority to facilitate his alleged harassment of petitioner. Petitioner's argument on this issue had already been rejected by this Court in *Meritor*. The Court of Appeals in *Meritor* held that the employer was strictly liable for a supervisor's rape and harassment of an employee under a hostile work environment claim because the supervisor's "appearance" of authority enabled him to "impose himself on his subordinates." 477 U.S. at 63. But the rule of

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[5] The Court of Appeal's decision to reject a theory of strict liability could also be affirmed on the ground that courts have mistakenly held that strict liability is mandated in *quid pro quo* cases. This argument was raised by WMATA but not examined by the Court of Appeals.

strict liability adopted by the Court of Appeals in *Meritor* was expressly rejected by this Court. *Id.* at 72.

Instead, this Court held that the availability of an effective grievance procedure for victims of harassment was "plainly relevant" to the issue of the employer's liability. 477 U.S. at 72. This Court nevertheless found that those procedures were not dispositive of the employer's liability in that case because the policy at issue (1) did not address sexual harassment; and (2) required employees to report complaints to their supervisor, even if the supervisor was the wrongdoer. *Id.* at 72-73. This Court accordingly found that it was "not surprising" that the employee failed to use that procedure. *Id.* This Court concluded by observing that a procedure "better calculated to encourage victims of harassment to come forward" provided a "substantially stronger" basis to "insulate" the employer from liability. *Id.* The Court of Appeals in this case correctly concluded that WMATA, unlike the employer in *Meritor*, had established and followed the procedures necessary to insulate itself from liability under the agency principles which Congress incorporated into Title VII. *See Meritor*, 477 U.S. at 72 (holding that "Congress' decision to define 'employer' to include any 'agent' of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits" on an employer's liability for the acts of its employees.)

3. Petitioner seems to acknowledge that the Court of Appeals adopted the correct standard of law but simply misapplied it to this case. Petitioner acknowledges that an employee's understanding of the availability of a grievance process may have some bearing on the issue of employer liability, but states that "whether the victimized employee *reasonably believes* . . . that reporting the harassment will do no good" must be the relevant inquiry. (Emphasis added.) Pet. 15. But that was the very inquiry conducted by the Court of Appeals in this case. *See* Pet. App. 12a (holding that an employer must show that the victimized employee "knew or should have known

that the employer did not tolerate such conduct and that she could report it . . . without fear of adverse consequences.")

Petitioner's ultimate contention, therefore, is reduced to a claim that the Court of Appeals erred in its application of this objective standard because petitioner offered testimony that she was afraid to invoke WMATA's complaint policy due to her supervisor's threats. Pet. 15 n.7. Petitioner, however, offered no evidence that her subjective fear was reasonable. As the District Court and the Court of Appeals unequivocally found, it was not. Pet. App. 13a, 17a, 43a-44a. The Court of Appeal's application of a correct standard of law to the specific facts of record hardly merits review by this Court.

* * * *

This Court's decision in *Meritor* recognized that Congress did not intend to hold employers strictly liable for unauthorized acts of sexual harassment where the employer has adopted and enforced aggressive policies designed to eradicate sexual harassment in the workplace. Any other rule would undermine the legal incentives to implement such programs, and would unfairly charge employers with liability for injuries that could have been prevented through use of the employer's grievance process. The D.C. Circuit's decision is fully consistent with *Meritor* and the balance struck by Congress in Title VII.

CONCLUSION

For the foregoing reasons, WMATA respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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